

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	Case No. 29009
)	
JESUS H. REYES)	BOARD DECISION
)	(Precedential)
From dismissal from the position of)	
Youth Counselor with the Heman G.)	NO. 93-04
Stark Youth Training School, Depart-)	
ment of the Youth Authority at Chino)	January 12, 1993

Appearances: Nujya A. Gale, Attorney, representing appellant, Jesus H. Reyes; Patricia Z. Ostini, Staff Counsel, representing respondent, Department of the Youth Authority.

Before Carpenter, President; Stoner, Vice President; Burgener and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the proposed decision of the Administrative Law Judge (ALJ) in an appeal by Jesus Reyes (appellant) from dismissal from the position of Youth Counselor at the Youth Training School, Department of the Youth Authority (Department). While finding that appellant's misconduct constituted misuse of State property, a failure of good behavior, and dishonesty, the ALJ nevertheless modified the penalty of dismissal to a 90 days' suspension.

The Board determined to decide the case itself, based upon the record and additional arguments to be submitted in writing and orally. After review of the entire record, including the transcripts and brief submitted by the Department,¹ the Board finds

¹The appellant did not submit written argument and neither party requested oral argument.

(Reyes continued - Page 2)

the original penalty of dismissal to be appropriate for the reasons set forth below.

FACTUAL SUMMARY

Appellant was appointed to the position of Youth Counselor on October 2, 1987. Prior to the hearing on this appeal, he medically retired.

At the time of the incident that formed the basis for the adverse action, appellant was off-duty on medical leave, recuperating from heart bypass surgery.

On October 3, 1990, appellant went to the Chino High School football field to observe his son practicing with the freshman football team. During the football practice, appellant witnessed an assistant coach involved in a defensive drill with a student during which the student and assistant coach were aggressively pushing each other. Appellant felt the assistant coach was being too rough with the student and approached the head coach and introduced himself as a parent. Appellant appeared angry and said that he did not like what the assistant coach was doing. He displayed his peace officer badge and then unzipped a leather bag and displayed some handcuffs and a 5-shot 38 special handgun. He then stated if the assistant coach ever did anything like that to his son, he would handcuff him and put the gun to his head. Appellant continued, "You understand my meaning?" and walked away.

(Reyes continued - Page 3)

Although not feeling personally threatened, the head coach was concerned for the safety of the students. He removed all athletes from the field and caused the police to be summoned. The police arrived and arrested appellant.

Appellant was subsequently convicted of violating Penal Code section 417(a)(2) which makes brandishing a weapon a misdemeanor.

During the Department's administrative investigation of the incident, appellant falsely denied that he had displayed his badge, gun or handcuffs to the head coach, and denied that he had made the threatening statements attributed to him.

Appellant was charged with dishonesty, misuse of State property, and other failure of good behavior off-duty that is of such a nature as to cause discredit to the appointing authority or appellant's employment. [Government Code section 19572, subdivisions (f), (p) and (t).]

ISSUE

What is the appropriate penalty in this case?

DISCUSSION

The Misconduct of Brandishing Weapon

Appellant's brandishing of his badge and personal weapon while making threatening remarks to a coach in a school football field constituted "other failure of good behavior...of such a nature as to cause discredit" to the Department. Appellant first identified himself as an employee of the Department by flashing his badge and

(Reyes continued - Page 4)

then misused his status and authority as a peace officer by displaying his handcuffs and firearm. As a result of the same misconduct, appellant was convicted of a misdemeanor under Penal Code section 417(a) (2).

While the misconduct in this case occurred off-duty, several facts support a finding that of a clear nexus exists between appellant's job as a Youth Counselor, in which he has custody and control of juveniles and young adults committed to the Youth Authority for criminal behavior, and the charged misconduct of brandishing a firearm. Most obviously, appellant's misused his status as a peace officer for the Department when he flashed his badge and displayed his handcuffs and personal weapon. Appellant's very privilege to carry a concealable firearm emanates from his status as a peace officer and Youth Counselor.²

Additionally, the display of his badge and weapon in a threatening manner to a football coach during a practice session with many young people present demonstrated appellant's poor judgment, inability to control his temper and failure to exercise discretion and responsibility. Appellant's actions reflected badly upon the Department.

²While the Department does not issue a permit for peace officer staff to carry a personal firearm off-duty, the Department does have the authority to revoke that privilege.

(Reyes continued - Page 5)

Finally, we note that the courts have consistently held that peace officers are held to a higher standard of behavior than non-peace officers (see e.g., Anderson v. State Personnel Board, 194 Cal. App. 3d 761, 769) and that peace officers may be disciplined for off-duty violations of the criminal laws. Ramirez v. State Personnel Board (1988) 204 Cal. App.3d 288; Parker v. State Personnel Board (1982) 120 Cal. App. 3d 84. Here, appellant's misconduct in brandishing his firearm resulted in his conviction of a misdemeanor.

The charge of "other failure of good behavior" under Government Code section 19572, subdivision (t), and the charge of "misuse of state property", subdivision (p), were established.

The Dishonesty Charge

As noted above, the ALJ found that at the Department's administrative inquiry into appellant's misconduct, appellant falsely denied that he had displayed his badge and gun.

In a recent Precedential Decision, Gregory Johnson, SPB Decision No. 92-01, we recognized the importance of honesty in the performance of Youth Counselor duties; in Johnson, an employee of the Department of the Youth Authority was charged with dishonesty when, during the job application process, he made misrepresentations to the sheriff's department regarding his physical health. We affirmed his dismissal, finding sufficient

(Reyes continued - Page 6)

nexus with his employment as a Youth Authority peace officer for the following reasons:

"...the Department has a legitimate concern over appellant's apparent willingness to bend the truth for his own convenience or personal gain...The Department must feel confident that its Youth Counselors are not acting based on improper motives when they make allegations of misconduct on the part of the wards, administer discipline, and issue progress reports to institutional management or the Youthful Offender Parole Board...A Youth Counselor's reputation for honesty obviously impacts his or her credibility with management, staff, and wards alike." (Id. at 9).

Appellant's blatant dishonesty in denying that he displayed his firearm to the coach in a threatening manner during football practice, especially in conjunction with the underlying misconduct, demonstrates that he lacks the traits necessary to perform his duties as a Youth Counselor.

The Penalty

Having found the evidence supports the findings of fact and conclusions of law set forth above, the only question left for determination is the appropriate level of penalty.

When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment, is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a

(Reyes continued - Page 7)

given set of circumstances, the Board has broad discretion. (See Wyllie v. State Personnel Board (1949) 93 Cal. App.2d 838, 843)

The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

In this case, as noted above, the public service is harmed both by appellant's conduct in brandishing his badge and weapon and by his dishonesty. The Department's image obviously suffers when one of its employees makes threats on a school football field, with young people present, while flashing a Department badge, a personal weapon, and handcuffs. The misconduct is exacerbated and trust

(Reyes continued - Page 8)

further diminished when an employee is dishonest during the investigation of the incident. The harm arising from appellant's misconduct is serious.

We specifically reject appellant's contention at hearing, and the ALJ's conclusion, that the circumstances surrounding the misconduct are sufficient to justify mitigation of the penalty. Appellant claimed that he acted out of his fear for the safety of the athletes and particularly his son. While a parent's angry expression of discontent with a coach's methods would not normally be objectionable, appellant's mode of expression constituted an extreme overreaction to the situation he observed and demonstrated a poor control of temper.³

Given appellant's dishonesty at the investigation of the incident, continued denial of wrongdoing at the hearing, and complete lack of remorse, we are not convinced that similar incidents would not occur if appellant were reemployed by the Department.

For all of the above reasons, we find that dismissal is an appropriate penalty.

CONCLUSION

³Notably, by the time appellant approached the head coach, the exercise that precipitated his anger was over and the athletes were on a water break.

(Reyes continued - Page 9)

The Department established the charges by the preponderance of the evidence. The penalty of dismissal is warranted.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584 is it hereby ORDERED that:

1. The above-referenced adverse action of dismissal is sustained;

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Clair Burgener, Member
Lorrie Ward, Member

*There is a vacant position on the Board.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 12, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board